## EDITOR'S NOTE

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DOCKET NO.

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM

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TOMMIE L. TOLIVER

PETITIONER

VS.

SULLIVAN DIAGNOSTIC TREATMENT

CENTER, (SDTC)

RESPONDENT

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Tommie L. Toliver

Petitioner Pro se

Box 54

Fallsburg, N.Y. 12733

Toliver vs. SDTC

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FXA

89-cv-8076

SDNY

White Plains

Broderick

Fox

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 24th day of March, one thousand nine hundred and ninety-four.

"UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, FILED MAR 24, 1994, George Lange IM, Clerk"

PRESENT:

HON. JAMES L. OAKES,

HON. THOMAS J. MESKILL,

HON. FRANK X. ALTIMARI,

Circuit Judges

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_____X

TOMMIE L. TOLIVER,

Plaintiff-Appellant,

-v- 93-7549

SULLIVAN DIAGNOSTIC TREATMENT CENTER,

Defendant-Appellee.

---

X

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued pro se by the plaintiff-appellant and by counsel for the defendant-appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Tommie Toliver appeals from a judgment entered in the United

States District Court for the Southern District of New York (Broderick, J.) granting summary judgment for the defendant and dismissing Toliver's employment discrimination claims brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. #2000-e ("Title VII").

Toliver, a black male, was employed as a night residential counsellor for Sullivan Diagnostic Treatment Center (SDTC). In 1987, he applied for a promotion to a supervisory position. Toliver was denied the promotion, and the job was filled by a white applicant with prior supervisory experience. Also in 1987, for a two-week period Toliver was permitted to leave work early two days a week to hold down another job. After the period had ended, Toliver asked to be permitted to use sick leave time to compensate for continuing to leave early.

His request was denied and he was told that he would have to work full-time again. Toliver then called in sick a minimum of five times between May and June of 1987 without providing doctor's notes as had been requested by his supervisor. Toliver was subsequently terminated on June 15 for his abuse of the sick leave policy and his insubordination. He later applied for another supervisory position for which he was not selected.

On December 6, 1989, Toliver brought an action against SDTC under Title VII on grounds of discriminatory dismissal and failure to promote, and failure to hire him as a counselling supervisor because of his race. Toliver had earlier sought relief from the New York State Division of Human Rights and the Equal Employment Opportunity Commission. Both agencies denied Toliver's

claims.

After pretrial discovery, the district court granted SDTC's motion for summary judgment and dismissed Toliver's complaint finding that Toliver had failed to prove any of his claims. We agree. Given the evidence in the record of Toliver's abuse of SDTC's sick leave policy, and Toliver's failure to prove that SDTC's reliance on that abuse for Toliver's dismissal was pretextual, Toliver's discriminatory discharge claim must fail. See Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (noting plaintiff's burden of persuading court of pretext of defendant's preferred justification for his employment decision in Title VII cases). Because Toliver has failed to prove a prima facie case of discrimination in his claims of discriminatory denial of a supervisory position, those claims too must

fail. Regarding those claims, given Toliver's lack of supervisory experience he has failed to prove that he was otherwise qualified for the supervisory positions. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (9173) (finding that plaintiff must show that he was qualified for the job as part of proving a prima facie case of discrimination under Title VII). Furthermore, the second time he was denied the position, not only did Toliver have no supervisory experience, he had actually been discharged from a position at SDTC for misconduct.

We have examined all of Toliver's contentions on this appeal and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

"s/Hon. James L. Oakes."

"s/Hon. Thomas J. Meskill,"

"s/Hon. Frank X. Altimari,"

Circuit Judges.

W.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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TOMMIE L. TOLIVER,

Plaintiff

89 Civ. 8076

(VLB)

MEMORANDUM ORDER

-against-

SULLIVAN DIAGNOSTIC TREATMENT CENTER (SDTC),

Defendant.

---

VINCENT L. BRODERICK, U.S.D.J.

I

Tommie L. Toliver ("Toliver") brought a pro se suit against the Sullivan Diagnostic Treatment Center ("SDTC") under Title VII of the Civil Rights Act of 1964 as amended, 42 USC #2000-e, on grounds of discriminatory dismissal and failure to hire him as a counselling supervisor because of race. Toliver sought relief from the New York State

Division of Human Rights and the Federal Equal Employment Opportunity Commission but received adverse determination from the state agency on August 30, 1988 and the EEOC on August 12, 1989, as well as on an earlier complaint to the State Division filed December 1, 1987.

(to Counsel of Record Apr 14 1993)

I granted summary judgment for defendant on February 1, 1993, but allowed Toliver 45 days to move for reconsideration. I grant the application for reconsideration but adhere to the original decision for the reasons set forth in the memorandum order of February 1, 1993 and the additional reasons which follow.

II

Toliver claims that discovery granted him by United States Magistrate Judge Mark D. Fox was not provided, but attaches no papers indicating that he had ever sought to compel compliance. Moreover, there is no indication of what the discovery assertedly not provided

would show which would have affected the proper resolution of defendant's motion. See Burlington Coat Factory Warehouse Corp. v. Esprit de Corp. 769 F.2d 919 (2d Cir. 1985).

Toliver asserts that he sought to dispose representatives of defendant but that no names were provided. An institutional witness, however, would be less significant than officials of defendant whose names are mentioned frequently in Toliver's papers and are obviously known to him. There is no claim here or in any papers filed suggesting that depositions of such persons were sought and denied, or scheduled but not taken.

Toliver further complains that defense counsel coached witnesses during depositions, but does not appear to have contacted the Magistrate Judge for relief. Moreover, Toliver does not set forth any particular answers of the witnesses which he contends should be discounted or the opposite

of the answer deemed the truth.[1]

Toliver states that no more than one occasion witnesses were told not to answer, but does not appear to have sought relief from the Magistrate Judge to obtain the answers if relevant. Toliver also fails to set forth the nature of the unanswered questions or what the answers might have shown.

If a party - even one appearing pro se - could successfully permit discovery to be completed with seeking relief at the time, but effectively complain of deficiencies in the discovery process for the first time in seeking reconsideration of a grant of summary judgment to the adversary, litigation could hardly ever be concluded.

III

Toliver complains that the Magistrate Judge had told him not to talk with employees

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[1]See United States v. Zafiro, 945 F.2d 881 (7th Cir. 1991), aff'd 113 S.Ct. 933 (1993).

of the defendant outside the deposition room, but never appealed to me from any such ruling at the time. Moreover, he does not show that he could not ask during the deposition any questions he would have asked at some other time. Such an instruction if given by Magistrate Judge Fox might serve a mutually beneficial objective in avoiding potential confrontation between plaintiff and employees of the defendant.

The weight of authority indicates that Toliver, as a party representing himself and hence functioning as an attorney, would be permitted to approach former but not current employees of defendant directly, outside any formal setting such as a deposition or judicial forum.[2]

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[2]See generally Du Bois Gradco Systems, 136 F.R.D. 341 (D.Conn. 1991); Action Air Freight v. Pilot Air Freight, 769F. Supp. 899 (E.D. Pa. 1991); Hanntz v. Shiley, 766 F. Supp. 258 (D.N.J. 1991); Curley v. Cumberland Farms, 134 F.R.D. 7 (D.N.J. 1991); Public Service Electric Gas Co. v. Associated Electric, 745 F. Supp. 1037 (D.N.J. 1991); Vallassis v. Shearson Lehman Bros. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah Oct. 25, 1991); Doe v. Eli Lilly & Co., 99 F.D.R. 126 (D.D.C. 1983); Niesig v. Team I, 76 N.Y.2d 363, 558 F.D.R. 1030, 599 N.Y.S.2d 493 (1990).

There is no indication that any instruction given by Judge Fox barred Toliver from contacting former employees of defendant.

IV

Toliver argues that defendant could not properly utilize prior supervisory experience involving the population served by an agency in evaluating applicants for supervisory positions, because this is not listed as a requirement in any job description or other document. Prior experience in a specific activity would appear relevant to choice among applicants for work involving that function, although like other facially legitimate criteria it could be shown in proper circumstances have been used as a pretext for illegal discrimination.

Even stray remarks can, depending on the circumstances, become important evidence of pretextual conduct. See Ostrowski Ins. Co. v. Atlantic Mutual Companies, 968 F2d 171, 182 (2d Cir. 1992); see also Kirschner v. Office of the Comptroller, 973

F.2d. 88 (2d Cir. 1992). No indicia of pretext has been presented with respect to defendant's consideration of specific supervisory experience involving the target population in selecting supervisors.

It is not a violation of Title VII for an employee to utilize an undocumented criterion not described on paper in choosing the best applicant to fill a job, especially a supervisory position. Subjective evaluation can also be part of a selection process without for that reason violating the statute, but cannot be allowed to become a pretext for illegal discrimination based on race or other forbidden criteria. See Watson v. Ft. Worth Bank & Trust Co., 487 U.S. 977 (1988); Mertens, "Watson v. Fort Worth Bank & Trust," 14 Employee Rel. L.J. No. 2 at 163 (Fall 1988). Were the contrary the rule, 42 USC #2000-e and Title VII would become a collective straitjacket requiring extensive paperwork to justify otherwise proper employment decisions; there is no indication

that this was the intent of Congress.

V

In other respects, Toliver's application for reconsideration restates his original contentions, somewhat altered to meet the conclusions drawn in memorandum order of February 1, 1993. Based on the submission of both parties which I considered on February 1, 1993, the background facts are undisputed. While Toliver had an opportunity to submit further information - his time to move for reconsideration was intended in light of pro se status - he has not enhanced his position by restating facts already established. See Military Services Realty v. Realty Consultants, 823 F.2d 829, 832 (4th Cir. 1987). Toliver's original submission which I relied upon in my February 1, 1993 memorandum order are thus as relevant now as then. See Bellino v. Schlumberger Technologies, 944 F.2d 26, 33 (1st Cir. 1991)

VI

In considering the case as a whole, I am

left with the clear conviction that no genuine issue of material fact is presented. It is undisputed that Toliver did not want to work full-time, and obtained a dispensation to work part-time which was in effect for a limited period. He then became involved in a dispute over use of sick leave. Toliver claimed illnesses excusing his presence at work without having sought medical advice. Even if the employer acted unwisely or erroneously, there is no indication that this dispute was manufactured as a pretext to dismiss Toliver because of his race after having retained him on the workforce for some time previously. Once Toliver was dismissed for what the employer considered sound (whether or not in fact erroneous) nonracial reason, it not plausible[3] that shortly thereafter the same employer would rehire him

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[3]Where a claim is "implausible," the claimant "must come forward with more persuasive evidence...than would otherwise be necessary". Matsuchita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

as a supervisor.

VII

Toliver's application for reconsideration ploughs broader ground. It is apparent that he sincerely believes that current efforts to overcome the heritage of discrimination are to a large extent mere "window dressing" (Toliver's application at 7). It would be easy to ignore this protest and decide this case on purely statutory grounds, but that would be to fail to confront Toliver's application in its full scope.

Anti-discrimination statutes can successfully preclude much discrimination based on forbidden criteria including race, but do not, in and of themselves, provide new opportunities necessary to overcoming the residue of past injustices can best be met is a matter for the political branches and the public to decide; major efforts have been made at various times to deal with this

critical subject.[4] Perhaps the Second World War was the Nation's most expansive affirmative action program, because everyone was needed - a reality setting the stage for the recommendations which ultimately led to the enactment of Title VII in 1964.[5] While the judiciary cannot meet this challenge or insure its resolution in a way satisfactory to Toliver or any other citizen, our Constitution and the judicial branch do protect the right to access to the political process where efforts to eliminate the drag weight of the past can be creatively pursued.[6]

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[4]See L. Sullivan, Build Brother Build (9169) (highly successful program in which jobs as part of the Apollo Project were guaranteed if necessary training was satisfactorily completed).

[5]See President's Committee on Civil Rights, To Secure These Rights (1947).

[6]Thus the Voting Rights Act (42 USC #1971 et seq.) and those constitutional principles which protect freedom of conscience and expression provide opportunities to seek to deal with the concerns reflected in Toliver's submission, albeit without assuring success in such efforts. See United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938); Powell, "Carolene Products Revisited" 82 Colom. L. Rev. 1087 (1982).

Construing Title VII to permit suits under it where there is no genuine issue concerning facts from which one could reasonably infer discrimination on forbidden grounds would, however, retard rather than promote the objectives of the statute.

SO ORDERED.

Dated: White Plains, New York

April 14, 1993

"s/VINCENT L. BRODERICK, U.S.D.J.

Copies Mailed to:

For plaintiff Pro se:

Tommie L. Toliver

Box 54, Route 42

Fallsburg, NY 12733

For Defendant:

Glen Rickles, Esq.

106 Benedict Blvd.

Croton-on-Hudson, NY 10520

(914) 878-9078

US CONSTITUTION

AMENDMENT XIV - DUE PROCESS/EQUAL PROTECTION

# RESUME

Tommie L. Toliver
Box 54, Route 42
Fallsburg, NY 12733
434-4135

Business Manager/
Social Studies Teacher

## General Background

Skillful administrator of federal, state and local government-funded programs. Former social studies teacher, specializing in practical education for the society of today and tomorrow. Background in counseling, working with disadvantaged youngsters and families, and with developmentally-disabled adults. Former manager-worker in service business with many practical insights to share.

## Administrator Experience

- Government Programs

As Deputy Director/Acting Executive Director of a rural anti-poverty agency, developed Action Programs, prepared work program and budget, developed proposals, conducted community needs assessment, and developed

management information system.

**Teaching Experience**

- Social Studies

Taught social studies in a suburban junior/senior high school. Emphasized consumer education as part of regular social studies curriculum. By acting as a resource person, assisted students in obtaining their own answers about the world around them.

**Teaching Experience**

The Disadvantaged

As Director of a transportation project to improve the employability of disadvantaged adults in the Mid-Hudson Region, taught job hunting techniques, counseled individuals and families in budgeting and consumer education.

Have taught daily living skills to trainable mentally and physically developmentally disabled adults in an institutional setting, including activities to improve motor skills and social skills.

**Business Experience**

Assistant Manager of a dry cleaning and

laundry business for eleven years. Oversaw the operation of the business. Taught skills to new employees, assisted customers, kept accounts, and prepared payroll.

Education

SUNY, New Paltz, 1975

BA, Social Studies

Provisional Certification, New York State

Sullivan County Community College, 1973

A.A.S. Business Management

Graduate Courses, SUNY, New Paltz, in multi-national corporations.

Employment

Deputy Director

Community Action Commission to Help the Economy, Inc. CACHE

Liberty, New York

1979 to 1980

Social Studies Teacher

Middletown City School District

Middletown, New York

1976-1979

Group Counselor

Crystal Run School

Fallsburg, New York

1977-1978

Project Director

Sullivan County CACHE

Liberty, New York

1971-1973

Assistant Manger

Murry's Dry Cleaners

So. Fallsburg, New York

1960-1971

Personal

Willing to relocate

Willing to travel

**References**

Available on request

**Addendum**

My employment since 1980 has been sporadic.

RESUME

James S. Stewart

44 Sunnybrook Circle

Highland, New York 12528

(914) 691-8447

PERSONAL

Birth 4/14/55; Dunkirk, New York

Married; two children

Health: excellent

EDUCATION

Fredonia High School, Graduated 1973

Empire State College, Alfred State University of N.Y. Bachelor of Science in Counseling, Graduated 1983

PROFESSIONAL EXPERIENCE

Sept. 1985 to present

New Horizons for the Mentally Retarded, Inc.

Habilitation Specialist. Responsibilities include working with clients in a community-base oriented atmosphere to prepare these clients for community living. My duties

include organizing meetings concerning clients needs and problems; goal writing and implementing goals dependent upon clients needs and overall teaching of skills to these clients which will prepare them to live within the outside community. These duties involve close interaction with other professional workers, supervision of fellow workers, and close dealings with clients' families.

April 1984 to Sept. 1985
Wassaic Developmental Center. Habilitation Specialist. Responsibilities included working with mentally retarded/ developmentally disabled in an institutional atmosphere. Duties were developing plans, setting goals, and providing a program to a group of clients in such areas as basic learning and self-help skills, communication and prevocational skills. This also included working with other professionals, social workers, case workers, doctors, and

supervising a small staff.

June 1981 to May 1982

J.N. Adam Developmental Center, Perrysburg, N.Y., Community Programmer. Responsibilities included care of residents within an institutional surrounding, and the development of community group homes for these residents in Salamanca and Olean, N.Y. Direct care of the residents and the home, including close contact with the community as a whole.

Nov. 1978 to Feb. 1981

Child Care Worker/Therapeutic Program Worker at the following locations: Bradford Children's Home, Bradford, PA; Millcreek Psychiatric Center, Cincinnati, OH; Becon Acres-General Protestant Orphan Home, Ohio; Randolph Children's Home, Randolph, NY.

Patrick H. Dollard
Executive Director

SULLIVAN
DIAGNOSTIC
TREATMENT

Elizabeth L. Berman For the Disabled CENTER

Position: Program Manager

Qualifications:

Preferred Master's degree or advanced credits in education or related fields of human services, such as social work, psychology, or child development. Shall be a qualified mental retardation professional with a minimum of one year administrative experience and/or prior completion of the agency management training course. A bachelor's degree, accompanied by some experience working with the developmentally disabled is acceptable.

Job Summary: Shall be responsible for all administrative functions within his/her intermediate care facility program. Shall insure the health, education, and welfare of the residential population and attending

staff personnel. Shall be responsible for writing and implementing programs for clients; smooth operation of the physical plant; and administrative compliance within State and Federal regulatory guidelines. Responsibilities: Shall be responsible to the Director of Residential Services.

Job Description - Program Manager

Shall Directly supervise all in-house residential staff and related staff. Shall provide through scheduling, an appropriate number of residential staff to provide a safe environment and active programming for clients.

Shall monitor all ongoing programs and insure that all programs are in compliance with State and Federal regulatory standards. Shall carry out the duties of a qualified

mental retardation professional as stated in 442 Federal regulations.

Will insure that all records and statistical information are accurate, current, and maintained in a professional and confidential manner.

Shall be responsible for arranging/conducting inservice staff training programs and documenting completion of inservice training. Shall serve as a liaison between the residential, clinical, and educational professionals involved in delivering services for residents.

As a QMRP, shall coordinate and summarize monthly progress notes.

Shall oversee scheduling for residential staff hours.

Shall be responsible for evaluation of staff members.

Shall design and implement individual habilitation training programs for all residents.

Job Description - Program Manager

Shall be encouraged to participate in public and community programs related to the human services.

Shall maintain the role of advocate for the handicapped through participation in community organizations, COH meetings, and involvement with professionals and community organizations.

Shall be responsible for conducting staff meetings with residential service staff,

minimally one (1) time per week.
Shall be responsible for participation in the screening process for all residents, and act as a member of the Admissions/Discharge Committee.

Shall be responsible for insuring compliance with written policy and procedures for medical emergencies.

Shall be responsible for preparation and presentation of materials necessary for State and Federal audits and reviews.

Shall participate in the interview process for employment of residential staff.
Summons police, fire, ambulance, and other emergency personnel as situation so warrants.
Conduct and record fire drills.

I have read the above job description and

fully understand my responsibilities in maintaining the health and welfare of the residents involved within the residential facility.

NAME _____ DATE _____

DIRECTOR OF RESIDENTIAL PROGRAMS _____ DATE _____

GLENN RICKLES
Attorney at Law
106 Benedick Boulevard
Croton-on-Hudson, New York 10520
(212) 947-5770

United States
(P.D. 4-21-71)
PLAINTIFF'S
EXHIBIT
U.S.
DISTRICT
COURT
S.D. OF N.Y.

Certified Return Receipt P-638 165 036

November 19,

34

Tommie L. Toliver
PO Box 54 - Route 42
Fallsburg, New York 12733

re: Toliver v
89 Civ. 8076 (VLB)

Dear Mr. Toliver:

In response to your Notice to Inspect:

Maria Muscatella
Box 233
Brackney, PA 18812
Job Description: Enclosed

As to question #2 in your Notice:

| Name | DOH | DOT | RACE | EDUCATION |
|---|---|---|---|---|
| Bertley, Thelma | 8/9/84 | | B | B.S. |
| Capovilla Kym A. | 8/16/83 | 5/18/90 | W | B.S.* |
| Cook, Shirley | 5/15/86 | | W | B.S. |
| Cuison, Erlinda | 7/9/90 | 9/30/91 | A | M.A. |
| Demarest, Connie | 10/23/87 | 10/1/88 | W | B.S. |
| Diehl, Janet | 1/30/84 | 6/2/90 | H | B.S. |
| Ellison, Thomas J. | 9/17/90 | | W | B.S. |
| Face, Deborah A. | 3/5/87 | | W | A.A.S. |
| Fulton, Lois E. | 4/23/85 | 7/14/91 | W | B.S. |
| Gallo, Ralph | 2/27/84 | | W | B.A. |
| Goode, | 9/7/85 | | W | M.A. |

| | | | | |
|---|---|---|---|---|
| Gerry | | | | |
| Lester, | 5/31/85 | 1/2/91 | W | A.A.S. |
| Garra C. | | | | |
| Meyerer, | 1/14/80 | 3/2/90 | W | B.S.* |
| Roxanne | | | | |
| Miltico, | 4/10/85 | | W | B.S. |
| Darlene M. | | | | |
| Porter, | 11/6/82 | | W | A.A.S. |
| Lynne D. | | | | |
| Raymond, | 10/24/90 | | W | B.S. |
| Dennis K. | | | | |
| Kivea | 4/11/91 | | W | B.S. |
| Jeanne | | | | |
| Shaffer, | 10/16/89 | | W | B.S. |
| Joyce | | | | |
| Stewart, | 3/2/87 | 8/13/87 | W | B.S. |
| James | | | | |
| Thomas | 5/6/85 | | W | B.S. |
| Judith G. | | | | |
| Tompkins | 6/27/83 | | W | B.S. |
| Melodie | | | | |
| Warren- | 6/17/83 | 9/1/89 | W | M.A. |
| brand, | | | | |

| | | | | |
|---|---|---|---|---|
| Hallie | | | | |
| Wolie, Regina | 12/24/84 | 8/5/88 | W | A.A.S. |
| Yoder, Kathleen | 1/26/84 | 5/25/90 | W | B.S. |

*Were Working on Degree

educational requirements for a resident, a residential program supervisor?

A I don't remember exactly what the requirements entailed. I don't know that. The basic requirements would have been qualified Bachelors of Science Degree and Q.M.R.P. capability. Those were main things that were looked for?

Q Was it a policy of SDTC to promote staff from within when their came an opening in a higher position?

A Well, that's certainly how I found. I began as a resident counselor and filled a number of positions over my ten years there.

Q Do you recall that in early 1987 the SDTC hired a program counselor, I believe, for a new house that was opening up?

A Well, we advertised for many of them. There was a lot of expansion.

Q Did you have any knowledge that I

applied for a program supervisor position?

A I did know that you applied.

Q There came a time in early 1987 when I requested from my shift supervisor to leave work at four o'clock in the morning two days a week;

A I am involved with future development of the agency and I am involved in the benefits.

Q That's what you do. What is your title?

A Director of Benefits and Future Expansion, agency growth.

Q How long have you held that position?

A About a month now.

Q What position did you hold prior to the one you described?

A It was from program supervisor of the Wawanda ICF.

Q Did you hold a position different than program supervisor prior to becoming program supervisor?

A Yes, I did.

Q What was that position?

A I was director of human resources.

Q Were the some lapse in your employment with SDTC?

A Yes, that is correct.

Q What length of time and when was that?

A It was about a year in length. I started back at SDTC in about 10/23 of last year.

---

time.

Q RC means?

A Residential counselor.

Q When were you appointed assistant manager and shift supervisor?

A I don't have the exact date.

Q Would it have been prior to August 1986?

A I can't remember when I was first, got the position.

Q Are you acquainted with a former employee named David Clark?

A Yes, I am.

Q What was his position at the time that he worked for SDTC?

A When he first came, I believe it was the night supervisor, shift supervisor.

Q And you elevation from residential counselor to shift supervisor?

A Yes.

Q Would that have been a promotion?

A Yes.

Q Is it the policy of SDTC to promote staff from within?

A Is it a policy? I don't know if it is.

---

promotion?

A Yes.

Q Did the agency have a policy of promoting staff from within?

A Yes.

Q Prior to becoming night supervisor, did you have a position prior to that?

A Prior to night supervisor, I was an RC.

Q I don't know if I asked you the question before. How long have you worked for SDTC?

A I started November 9, 1984, seven years ago.

Q Do you remember how long you were in the position of RC before becoming night supervisor night shift supervisor?

A No.

Q Your elevation to night shift supervisor, was that considered a promotion from RC?

A Yes.

Q Do you recall when you started working at SDTC?

A No.

A A little more than two years.

Q That would have been up until sometime about 1986?

A Right.

Q What position did you assume after the residential counselor position?

A Night supervisor of one of the residences.

Q Would that be night supervisor or shift supervisor?

A Okay, shift supervisor.

Q I am not clear on that myself.

A That's true, shift supervisor.

Q During the time your employment with SDTC, were you knowledgeable of the policies and procedures?

A Yes, I was.

Q Would you say that your position as shift supervisor was a promotion from residential counselor?

A It was.

Q Was it a policy of the agency and

the center to promote people from within?

MR. RICKLES: If you know, sir?

A Yes, it was.

MR. RICKLES: I represent the defendant.

MR. TOLIVER: Excuse me.

MR. RICKLES: I represent the defendants in this case. Miss Stanton is employed by the defendant in this case.

MR. TOLIVER: I am speaking -- all right, your statement that you represent the witness, I take exception to for the record. You had indicated to me sometime before that you only represented the agency. We will begin.

Q Miss Stanton, will you please state your full name?

MR. RICKLES: Any stipulations?

MR. TOLIVER: I have none to make now.

MR. RICKLES: Let's go forward.

Q State your full name and your legal address.

A It's Jeana Marie Stanton, Benmosche Road, Harris, New York, Sullivan Diagnostic.

Q Your legal address?

A PO Box 425, Harris, New York, 12742.

Q How long have you lived there?

A Two years.

May 8 Box 54

Fallsburg, NY 12733

24 May 1991

Glenn Rickles

106 Benedict Boulevard

Croton-on-Hudson, NY

Re: Toliver -v- SDTC, 89 Civ. 8076 (VBL)

Certified Mail #714903344

Sir:

Please provide me with the name(s) of the person(s) who will represent/defend this action.

May I receive this information as soon as possible?

Sincerely,

Tommie L. Toliver

cc: Hon. Joel J. Tyler, U.S. Magistrate Judge

RECEIVED

MAY 29, 1991

PRO SE OFFICE

APPENDIX N. 1 of 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

_____X

TOMMIE L. TOLIVER,

Plaintiff 89 Civ. 8076 (VLB)

-v-

SULLIVAN DIAGNOSTIC TREATMENT CENTER (SDTC),

Defendant.

AFFIDAVIT IN SUPPORT OF RESPONSE MOTION FOR SUMMARY JUDGMENT

_____X Certified mail #P130838882 Priority Mail Resubmitted 4/5/93 Express mail #1B489457375

STATE OF NEW YORK )

)SS.:

COUNTY OF SULLIVAN)

I, Tommie L. Toliver, deposes and says,

1) I was employed by SDTC on or about 4 July 1986 as a part time/ substitute residential counselor.

2) Within a week I was listed on the

assignment sheet to work 5 days per week with 2 assigned days off.

3) Around mid/late September 1986 I was asked by my immediate supervisor, Anne Brawley, would I consider working "full time" and would I quit my job at New Horizon.

4) I advised Brawley that I would accept the designation as full time (employee) but that I would not quit my job at New Horizon - that the wages at SDTC was insufficient. Late September 1986 I was advised of my full time status.

5) Early 1987 SDTC advertised for a program supervisor. I sought promotion to the position, submitted an application, and was interviewed by Dennis Raymond and Maria Muscatello. Someone other than myself was appointed to the

position - a white male from outside the Agency, SDTC. I remained in my positionas a residential counselor.

6) In early April 1987, I was advised my supervisor that the school (New Horizon) had been burned down, that the clients had been moved to Wassaic Developmental Center (a State institution), and that I had made a commitment to commute to Wassaic four days a week by bus provided by New Horizon. And, that I requested (of Brawley) to take a leave of absence or that I would resign, or that I would have to leave work early two days a week (from SDTC) in order to take the bus to Wassaic.

7) Anne Brawley said that you (Toliver) can leave early (2 days a week) - just keep a record of the

time n ake it up (other days).

8) Towar he end of April 1987 I advised Brawley that we expected to be back at New Horizon within the week. Within the week, I advised Brawley that they (New Horizon) says it will be at least another week before we would be able to go back to New Horizon.

9) In early May 1987, I advised Brawley that I had made up lost time whenever I could, had the opportunity to, but that recently, I had few opportunities and that I did not want it to "get out of hand". And, that if you (Brawley) want to charge me for accumulated time, I would have no problems. Brawley replied that don't worry about it, just keep a record.

10) Toward the end of May 1987, I advised Brawley that New Horizon

would not reopen and that State, Wassaic, would take over the New Horizon clients, July 1, 1987. A day or two thereafter Brawley advised me that you (Toliver) can no longer leave early. I asked Brawley what happened? She answered that they say that you can't. I reminded Brawley that (you know) I would have requested a leave of absence or even resigned but that you said. Brawley interrupted, said that a leave of absence or resignation is no longer an option.

11) On a day after, I had called in sick, Brawley asked me was I really sick. I responded that if I had not been sick, I would not have called in sick.

12) On 14 June 1987 Raymond called my home - stated that he had been

advised that I had called in sick. I responded that: then why are you calling? He then stated that you (Toliver) don't sound like somebody who is sick. I answered that I don't know how somebody who is sick is supposed to sound, and that I don't appreciate your call - please don't do it again. Raymond then directed that I come to his office when I returned to work - that he wanted to see me.

13) On 15 June 1987, shortly after I had started work, I was called into the office to see Raymond. When I arrived in the office, there were three people present: Raymond, Brawley, and my then immediate supervisor, Queen Walker. Raymond advised that if you call in sick again you are required to bring a doctor's note...you don't act like

someone who wants to move up in the Agency. I responded that I understood - that if I should call in sick in the future, I would bring a doctor's note. Raymond then said not only will you bring a doctor's note for any future call ins, but you are required to bring a doctor's note for the time(s) you called in before. I advised that for a time that I had not seen a doctor, I could not bring a doctor's note. Raymond then said, if you fail to bring a doctor's note, including those times you called in before, you are subject to be fired. I answered that if I should call in again, I would bring a doctor's note, but that I won't even pretend to try to bring a doctor's note for a time(s) that I did not see a doctor, and if there

is nothing else to discuss, I would be excused - "I have to take a pail of soap to the next building". I then returned to work, took the pail of soap to the next building and then returned to my work station. Raymond remained in the building for some time. I came face to face with Raymond more than one time during the course of caring for clients.

14) When I returned to work on 18 June 1987, I was met outside the door by Sky Yoder, Program Supervisor, who told me you (Toliver) can't come in, Dennis says that you are fired.

15) During the course of my employment with SDTC, I had four conversations with Raymond. One, on a night when he asked me and another staff person to go to another house, the adult home, and straighten out/

bring the clients record books up-to-date. The second time, on the same night, when I asked him what method did he want to use (since more than one could be employed and that for more than six months, no records have been kept), he (Raymond) replied that he didn't know - (Toliver) use your best judgment. The second occasion and that third time I spoke with him was when he called my house on 14 June 1987. The fourth and last time I spoke with him was on 15 June 1987 in his office.

16) On or about 30 November 1987 Toliver filed a complaint with both the New York State Division of Human Rights and the Equal Employment Opportunity Commission.

17) In August/September 1987, SDTC advertised for a program

supervisor. Toliver applied, but was advised that he was not qualified.

18) On or about 18 March 1988, I filed a second charge with NYSDHR and EEOC charging continued discrimination.

19) In August of 1988, NYSDHR issued its decision - in favor of SDTC.

20) August 1989 EEOC issued its determination - adopting the decision of NYSDHR - at the same time issued (to Toliver) a right to sue letter. Subsequently Toliver filed this action in Federal Court.

I swear that the above is true.

"s/Tommie L. Toliver"

Sworn to before me this
21st day of January 1993
"s/Holly J. Dillon"

Holly J. Dillon

Rotary Public, State of New York

No. 4958741

Qualified in Dutchess County

Commission Expires Oct. 2, 1993

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

X

TOMMIE L. TOLIVER,

Plaintiff, AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

vs.

SULLIVAN DIAGNOSTIC TREATMENT CENTER, 89 CIV. 8076 (VLB)

Defendant.

X

STATE OF NEW YORK )

) SS. :

COUNTY OF SULLIVAN )

DENNIS RAYMOND, deposes and says,

1) At the time of Plaintiff's, Tommie Toliver's employment with Sullivan Diagnostic and Treatment Center (SDTC) from September 24, 1986 through his termination on June 15, 1987, I was SDTC's Director of Residential Services and I have personal knowledge of the facts stated herein.

2) SDTC is a New York, not for profit

corporation, providing residential, clinical and educational services to persons with developmental disabilities.

3) Mr. Toliver was employed by SDTC as a residential counselor, responsible for caring for persons with developmental disabilities who reside in SDTC's intermediate care facilities.

4) In April of 1987, Mr. Toliver requested that he be allowed to leave work early for two days per week for a limited time to attend to duties at another job. I granted Mr. Toliver's request.

5) In may of 1987, Mr. Toliver requested of SDTC that he be allowed to utilize sick leave time to compensate him for the hours he left SDTC early. Inasmuch as sick time is to be used for illness only, Mr. Toliver's request was denied.

6) On May 18, 1987, SDTC informed Mr. Toliver that his leaving early had been extended far beyond the authorized short period of time, and due to the client needs

and additional burden put on his co-workers, he would no longer be allowed to leave early.

7) In lieu of leaving early to attend to his other job, Mr. Toliver commenced a clear pattern of calling in sick. He did so on May 24, may 31, June 4 and June 7.

8) On June 8, 1987, Mr. Toliver's supervisor confronted him with the sick abuse pattern. Mr. Toliver was directly asked whether said sick time was being utilized to attend to his other job. Mr. Toliver simply smiled, and gave no verbal response. Mr. Toliver was then advised once again, that such leave may not be used to attend to another job. Mr. Toliver's response was an angry one and he stated that, "Tell Dennis (Raymond) to give me a lay off slip." On that same day, SDTC suggested the possibility of a four (4) day work week to accommodate Mr. Toliver's needs.

9) On June 9, 1987, Toliver informed SDTC that he did not desire a four (4) day work week and he was "going to use my time."

Mr. Toliver stated he would continue to utilize sick time.

10) I called Mr. Toliver at home on June 11, 1987 to set up a meeting to discussed his sick time utilization. I told Mr. Toliver that sick time was to be used for illness only, not for other reasons. Mr. Toliver stated he understood. Mr. Toliver then stated he would not be coming in to work on this day, and would be taking sick time. I informed Mr. Toliver that O would then require a doctor's note to verify his illness. Mr. Toliver refused to go to a doctor or provide a doctor's note. I then read to Mr. Toliver the section of the personnel handbook stating that "excessive absences or pattern of absences may result in disciplinary action up to and including termination." I asked Mr. Toliver if he understood. Mr. Toliver shouted at me, "yes." I then read to Mr. Toliver from another section of the personnel handbook stating that "proof of illness may be

required at any time." Mr. Toliver's response was a shouting "I will not go to the doctor." I then stated that his refusal to obtain a doctor's note was insubordination which could also result in disciplinary action, including termination. Mr. Toliver's response was again in loud angry tones, "I will not go to a doctor."

11) On June 13, 1987, I met with Mr. Toliver at SDTC and again read him the pertinent portions of the personnel handbook concerning sick time and doctor's notes and gave him copies of said pages (annexed hereto as Exhibit A). Mr. Toliver stated, again angrily, that he would continue to attend to his other job and he would continue to call in sick.

12) Mr. Toliver called in sick the very next day, June 14, 1987.

13) On June 15, 1987, I requested a doctor's note from Mr. Toliver. Mr. Toliver angrily refused to provide same. I then terminated Mr. Toliver for his abuse of sick

leave utilization and insubordination, not for reasons relating to his race and/or color.

14) Mr. Toliver applied for two supervisory positions at SDTC, one while he was still employed at SDTC and one subsequent to his termination. The persons hired for these two supervisory positions, had clearly superior supervisory and job related experience than Mr. Toliver and were hired. Additionally, due to the reasons for and facts surrounding Mr. Toliver's termination, SDTC decided that Mr. Toliver would certainly not receive a supervisory position at SDTC.

I swear the above is true.

"s/Dennis Raymond"

Sworn to before me
This 3rd day of December, 1992

"s/Irene Woods"

Notary Public

IRENE WOOD
Notary Public, State of New York
Qualified in Putnam County
Commission Expires May 2, 1994

Box 54

Fallsburg, N.Y. 12733

21 January 1993

Hon. Vincent L. Broderick, USDJ

Southern District of New York

101 East Post Road

White Plains, N.Y. 10601

Certified Mail # P130838882/Priority Mail

Re: Toliver -v- SDTC, 8076

Sir:

Enclosed herein is plaintiff's response to defendant's Motion for Summary Judgment. Plaintiff respectfully requests a conference on the motion.

Sincerely,

Tommie L. Toliver

cc: Glen Rickles via Certified mail #P130838882/

Priority Mail

APPENDIX O